

# Is Travel to Syrian Warfare a Terrorist Crime? The Finnish Case

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Martin Scheinin Di 8 Mai 2018

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Finland introduced the notion of terrorism into its Penal Code only in 2003, pursuant to the EU Framework Decision on combating terrorism (2002/475/JHA). A new Chapter 34a on terrorist crimes was inserted into the Penal Code in order to implement the obligations stemming from the Framework Decision. Since then, the Chapter has been amended several times, including by inserting a new Section 5b on travel for terrorism (2016) or Section 4b on receiving training for terrorism (2014). An English translation up to 2015 can be found [here](#). A new round of amendments is currently awaiting parliamentary approval, in order to implement the EU Counter-terrorism Directive 2017/541/EU.

So far there have been very few prosecutions, and no convictions. A first case concerning actual acts of violence being prosecuted as terrorist crimes is currently pending before the Turku District Court, related to public stabbings on 18 August 2017 where two persons were killed and several others injured by a single perpetrator in the center of the town. The prosecutor has charged the defendant with two instances of murder with terrorist intent and multiple counts of attempted murder with terrorist intent. The ruling is expected in May or June of 2018.

This short blog post relates to a ruling by the Helsinki District Court of 24 January 2018 that related to an alleged plan by three Muslim men, all Finnish nationals, to travel to Syria and join the ongoing armed conflict there. The alleged acts would have occurred in 2013, i.e. before the entry into force of the foreign fighters provision (Section 5b) of 2016. The prosecutor chose to base the charges on Section 2, *Preparation of an offence to be committed with terrorist aim*, under the construction that joining the armed opposition forces in Syria so as to engage in hostilities against the official army of the al-Assad regime, could have resulted in death or injury to members of the Syrian military forces.

It is proper to disclose that this author gave expert testimony to the court, and that this opinion is reflected in the ruling. In a 210-page judgment (Helsinki District Court R 17/8720, 24 January 2018) the Court rejected all charges related to terrorism, including the main charge of allegedly preparing to kill or maim soldiers of al-Assad's army. In the ruling, this charge by the prosecutors is paraphrased as follows:

The defendants have made preparations to kill or at least seriously wound members of the Syrian government's armed forces during hostilities of traditional land warfare...

Insofar as (such plans) relate to crimes covered by Chapter 34a, Section 1.1, items 5 to 7, of the Penal Code, the fulfilment of the plan could have caused serious harm to the state of Syria by undermining the combat capacity and morale of governmental armed forces and the fundamental structures of the state of Syria and its central functions in society.

One of the arguments by the prosecution was that in 2013 the defendants had a plan to join a particular armed group, Kataib al-Muhajireen (KAM) that now was characterized by the prosecutors as a terrorist organization. KAM had been added on a US list of terrorist organizations in September 2014 and had allegedly morphed into Jaysh al-Muhajirin wal-Ansar (JAMWA) that was put on the UN 1267 list of ISIL/Al-Qaida terrorist organizations in August 2015. These listings would have occurred after the material facts of the actual charges.

In my expert testimony I emphasized that in relation to the actual charges – preparing for acts of terrorism – it was immaterial which armed forces the defendants perhaps were planning to join, as in any case they were only alleged to have planned participation as part of an organized armed group in traditional land warfare against the army of the Syrian government, i.e. in acts that were covered by recital 11 of the Preamble to the EU Framework Decision and hence outside the scope of application of the Framework Decision. Eventual crimes committed in that context – war crimes or crimes against humanity – are covered by Chapter 11 of the Finnish Penal Code, not by Chapter 34a on terrorist crimes.

What follows below is a fairly extensive quotation from the judgment. The acquittal of the third defendant (C) is the key part of the whole ruling and is therefore presented in italics:

The prosecutors have further specified the charges so that any preparation by the defendants to kill or seriously wound (persons) is alleged only in respect of participation in the conduct of hostilities belonging to traditional land warfare. The prosecutors have not for instance alleged that the defendants would have planned to participate, separately or as members of KAM, in terrorist attacks against the civilian population not taking part in hostilities...

... even if it was proven that the defendant has a tentative intention to join an opposition group in Syria known for its radical actions, this need not automatically mean that the defendant had an intention specifically to carry out terrorist crimes...

According to his own admission, A had when departing from Finland an intention to join the hostilities of land warfare in the ranks of the opposition forces and also B had for his part at that stage regarded as possible that he would join the hostilities. This kind of joining of hostilities on its own, without a terrorist intent, does not meet the definition of the crime at issue in Charge No. 10 against the defendants...

No evidence has been submitted to prove that B and A would, prior to their departure from Finland, been aware, contrary to their own denial, of the characteristics of the KAM organization described in the charge sheet or the links of S to KAM. At that phase of time KAM had not been generally listed as a terrorist organization...

The charges based on item No. 10 are rejected in respect of A and B.

When it comes to C, the prospect of conviction is clearly more pertinent than for the other defendants, taking into account that C who, as explained before, had equipped himself for Syria in a way that implies an intention to join hostilities and had appeared being prepared, and who hence can be understood as for his part having had a goal-oriented vision and plan concerning travel to Syria, in addition to which C had preexisting KAM contacts in the country.

Taking into account..., that no evidence has been shown that C would ever have actually participated in any hostilities in Syria or in activities that would meet the criteria of the provision of training for terrorism under the auspices of KAM or otherwise, it is not possible to draw direct conclusions that C would have had, between 1 November 2012 and 6 June 2013, any detailed and actionable plan or decision to join KAM with a terrorist intent and/or to participate that way in terrorist activity, despite certain strong and partly objectively observable predictive indications to the contrary. *A mere decision to participate in hostilities without a terrorist aim does not meet the elements of the crime referred to in the charges.*

Charge No. 10 is therefore rejected also in respect of defendant C.

Through their own choice the prosecutors had made the case crystal clear: it was not even alleged that the defendants had made preparations to commit actual acts of terrorism. The allegation was that they had planned to join organized armed opposition forces in traditional land warfare against the official army of the Syrian state. Some confusion follows from the allegation that the armed group the defendants had planned to join, possibly qualified as a terrorist organization. This confusion burdens the line of reasoning by the District Court which ponders whether KAM was a terrorist organization in 2013 and whether it mattered if the defendants knew that it was. Ultimately the terrorism charges were rejected for the

correct reason, namely that a mere decision to participate in armed hostilities in the form of traditional land warfare against the government's army and without a terrorist aim does not constitute an act of preparing to commit terrorist crimes.

The 210-page judgment contains only one reference to considerations related to human rights or constitutional rights. When reporting on the expert testimony given by this author, the court (correctly) writes that in my view it would be highly problematic in respect of human rights and the principle of legality in criminal law to interpret the EU Framework Decision to the effect that many ordinary crimes constitute terrorism when they are committed with the aim of destabilizing a dictatorial regime in any part of the world.

The ruling has become final, as the prosecutors have on 31 January 2018 decided not to appeal.

There are a couple of lessons that can be drawn from the Finnish case. Firstly, prosecutors need to understand that instead of prosecuting for terrorist crimes simply on the basis of national Penal Code provisions that perhaps were enacted in the wake of the EU Framework Decision or now the EU Directive, they need to understand the broader international and European conceptual framework related to terrorism and terrorist crimes. It may appear as attractive to ask for harsher sentences with reference to terrorism. Prosecutors should however understand that this comes with the cost of having to establish additional subjective and objective elements beyond what is needed as evidence sufficient for conviction for an ordinary crime.

Secondly, the Finnish case shows how national implementing legislation can easily suffer from systematic or linguistic errors when transposing EU legislation. Recital 37 of the Preamble of the EU Counter-terrorism Directive, related to situations of armed conflict, requires much more attention than what was given to corresponding Recital 11 of the Framework Decision. Otherwise prosecutors may also in the future be confused in choosing between national Penal Code provisions on ordinary crimes, war crimes, crimes against humanity and terrorist crimes. In this respect pending Government Bill No. 30/2018 is somewhat disappointing, as it addresses the issue in the motivations but not in the actual provisions of the Penal Code.

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